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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 433

STATE OF MINNESOTA,

Appellant,

vs.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,

Appellees.

APPELLANT'S BRIEF ON REMOVAL TO AND JURISDICTION OF CIRCUIT COURT.

M. D. MUNN,
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Of Counsel.

W. B. DOUGLAS,
Attorney General.

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STATE OF MINNESOTA,

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THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, et al.,

Appellees.

SUPPLEMENTAL BRIEF MADE PURSUANT TO THE ORDER OF THE COURT, ON THE QUESTION WHETHER THE CIRCUIT COURT OF THE UNITED STATES OF THE DISTRICT OF MINNESOTA PROPERLY TOOK JURISDICTION OF THE CASE ON ITS REMOVAL THERETO.

I.

Record.

This action was removed from the District Court of Ramsey County, Minnesota, on the joint petition of all the defendants, upon the ground that the action arose under the Constitution and laws of the United States, and that the right upon which it was based and on which a recovery by plaintiff depended, would be defeated by one construction of the Constitution or said laws, and sustained by an opposite construction.

Divers citizenship did not form a basis for such removal, and under the rule settled in *Postal Telegraph Cable Co. vs. Alabama,*

155 U. S. 482, could not rightfully be presented as a ground therefor. The material portion of such petition for removal, is as follows:

"That this action arises under the Constitution and laws of the United States and more especially under the eighth section of the first article of the Constitution and the fourteenth amendment thereto, and the act of Congress entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, and that the title and right on which the said action depends and is based, and on which a recovery by plaintiff depends, will be defeated by one construction of the Constitution or said law, and sustained by an opposite construction, in this:

That said complaint alleges a combination among the defendants for the purpose of monopolizing, and which, as is alleged does monopolize commerce among the States of the Union, as well as within the State of Minnesota, and sets forth the provisions of a statute of said State which forbids every contract or combination in restraint of trade or commerce between any of the people of said State and any of the people of any other state or country, and which prohibits and declares unlawful any union or combination to which a corporation of said State is a party, the purposes or effect of which is to control or monopolize in any manner, the trade or commerce, or any part thereof, of the several states.

And the complaint among the states have been effected by the defendants in violation of said State statute, and also in violation of said Act of Congress of July 2, 1890.

And the complaint prays that it be adjudged that the said combination and agreement and all acts done and to be done thereunder are in violation of said State statute and said act of Congress and that plaintiff may thereupon, and because of such adjudged violation, have the relief specially prayed and also general relief."

(Record, 47-8a)

Appellant in its bill of complaint (Par. 10, Rec. 22-24a) alleged that appellees by the acts complained of violated three enactments

of the Legislature of the State of Minnesota, two of which, so far as material, are as follows:

> Sec. 1, Chap. 29, G. L. 1874. "No railroad corporation, or lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control, a parallel or competing line, * * * "
>
> Sec. 1, Chap. 359, G. L. 1899. "Any contract, agreement, arrangement or conspiracy or any combination in the form of a trust or otherwise, heretofore entered into, which is in restraint of trade or commerce within the State, or in restraint of trade or commerce between any people of this State and *any of the people of any other state or country,* * * * is hereby prohibited and declared to be unlawful. * * * Or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce of any part thereof, of this state or the several states, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful."

Appellant at the end of paragraph 11 of its bill of complaint (Record 26a) alleged, that:

> "If said Northern Securities Company is allowed to hold and control the stock of said railroad company, and to carry out the purposes and object of its incorporators, as well as its own, full faith and credit will not be given to the public acts of this complaint, and it will be deprived of a further right guaranteed to it by the Constitution of the United States."

And in Parapraph 18 of its complaint (Record, 36a), further alleged, that by virtue of the acts of the defendant set forth and therein complained of—

> "A monopoly in railway traffic in Minnesota, as well as without said State, has been created, to the great, permanent and irreparable injury to the State of Minnesota and the people thereof, and in violation of its laws and of the laws of the

United States, in such case made and provided, viz.: 'An Act of Congress approved July 2, 1890, entitled An act to protect trade and commerce against unlawful restraints and monopolies.'"

II.

Jurisdictional and Removal Acts.

The Act of Congress of March 3, 1875, Chapter 137, as amended, defining the jurisdiction of the Circuit Court of the United States and regulating the removal of causes from the State courts thereto, so far as is material, is as follows:

Sec. 1. "That the Circuit Court of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, whether the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars, and *arising under the Constitution or laws of the United States,* or treaties made, or which shall be made under their authority.* * * "

Sec. 2. "That any suit of a civil nature at law or in equity, *arising under the Constitution or laws of the United States* or treaties made or which shall be made under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district, * * * "

III.

Additional Facts.

Prior to the removal of the cause to the Circuit Court of the United States, the president of the Northern Securities Company, upon whom a summons had been served while within the territorial boundaries of Minnesota, appeared specially by counsel and filed an

affidavit to the effect that said company was not the owner of any property situated within the State of Minnesoa, had not transacted, and did not contemplate doing, any business therein, and that it never had within said state any office, officer, place of business, or agent. (Record, 54-ea, fols. 227-230). (That the right to renew this motion is not abridged by the removal of the cause, see

Goldey vs. Morning News, 156 U. S. 518;
Wabash Western Ry. vs. Brow, 164 U. S. 271.

The motion to vacate the service of process upon the Northern Securities Company was thereafter withdrawn upon condition that appellant consent to have its cause tried in said Circuit Court, and on the further condition, which was assented to, that if the question of jurisdiction of the Circuit court of the United States over the subject matter of said action arose upon the motion of the court, and it was determined that such jurisdiction did not exist, the fact that this defendant had voluntarily appeared in the action and waived jurisdiction over its person, should not thereafter be urged or considered, and that such motion to vacate the service of process could thereafter be considered by the State Court of Minnesota the same as if such general appearance had never been entered in the Circuit Court.

The record shows that the Great Northern Co. amended its by-laws after the formation of the Northern Securities Co. so all stockholders' meetings could thereafter be held outside the limits of appellant, thus avoiding the necessity of the Northern Securities Company coming into Minnesota to vote its stock. (See folio 3630, page 911 of Record).

While it may be urged that nothing which occurred subsequent to the removal of this cause to the Circuit Court can fairly be considered as affecting, either directly or indirectly, the jurisdiction of the Circuit Court on the subject matter of the action, we also call

attention to the fact that each of the defendants in their respective answers thereafter filed, challenged the validity of the laws of the State of Minnesota pleaded in appellant's bill of complaint, as being in violation of the Constitution of the United States, and claimed, that they were "controlled and made of no effect by other legislation of the State of Minnesota and of the United States."

(See Answer of one of the Defendants—which is a duplicate of all—Record, page 82a, Par. 7.)

IV.

Argument.

Did the Circuit Court of the United States upon the above record, have jurisdiction over the subject matter of this action?

It is clear:

1st. That the Circuit Court has jurisdiction of all civil actions in part arising under or depending upon the construction of the Constitution or laws of the United States or treaties made therewith.

Section 2 of *the Removal Act, supra;*
Postal Tel. Cable Co. vs. Alabama, 155 U. S. 482;
Ames vs. Kansas, 111 U. S. 462.
Gold Washing and Water Co. vs. Keyes, 96 U. S. 203;
Shoshone Mining Co. vs. Rutter, 177 U. S. 507;
Cummings vs. Chicago, 188 U. S. 410.

Read in the light of Section 5 of the Court of Appeals Act—Chap. 517 of the Laws of 1891—it is equally clear that jurisdiction is assumed to exist in the Circuit Courts and an appeal authorized "in any case that involves the construction *or application* of the Constitution of the United States."

2nd. It is settled that the Supreme Court of the United States is without original jurisdiction of this controversy.

Minnesota vs. Northern Securities Co., 184 U. S. 199.

3rd. It is also equally clear, assuming the facts to be as stated in the affidavit of the President of the Northern Securities Co., above referred to, to the effect that the Northern Securities Company is not the owner of any property situated in Minnesota and never transacted any business therein, that the courts of Minnesota cannot acquire jurisdiction to hear and determine the issues involved herein, for the reason that jurisdiction over the person of the Northern Securities Company cannot be obtained.

Pennoyer vs. Neff, 95 U. S. 714;
St. Clair vs. Cox, 106 U. S. 350;
Goldey vs. Morning News, 156 U. S. 518;
Barrow Steamship Co. vs. Kane, 170 U. S. 100;
Cabanne vs. Graf, 87 Minn. 510.
Conley vs. Matheson Alkely Works, 190 U. S. 406.

4th. It was settled in the case of *Minnesota vs. Northern Securities Company, supra*, that the Northern Pacific and Great Northern Railway Companies are necessary parties with the Securities Company, and being residents of different states and not engaged in doing business in any single state, it follows that jurisdiction of the person of all the defendants cannot be obtained elsewhere than in this court, in which the Securities Company has voluntarily appeared.

Under the construction of the Federal Constitution which obtained in *California vs. Southern Pacific Ry. Co.*, 157 U. S. 270, and *Minnesota vs. Northern Securities Co., supra*, it follows as

prophesied by Mr. Justice Harlan and Mr. Justice Brewer in their dissenting opinion in *California vs. Southern Pacific Ry. Co.*, unless a Federal question is deemed to exist in this record which gives to the Circuit Court of the United States jurisdiction over the subject matter of the action, that under our dual form of government, a sovereign State will be deprived of the right to invoke the jurisdiction of any court in the land for the purpose of enforcing its laws or protecting its proprietary interests from unlawful acts done in violation of the laws of the State or Nation.

It is alleged in the bill of complaint and appears from the evidence, that the State of Minnesota is the owner of over three millions acres of land adjacent to the lines of railway involved, the value of which would be greatly reduced by the creation of a monopoly in railway traffic in northern Minnesota. It also appears that Minnesota, as a purchaser and shipper of supplies for its various institutions situated upon the lines of the Northern Pacific and Great Northern Railway Companies, is interested in the maintenance of competition betweenn such companies and will be irreparably injured by the striking down of competition between them. It is positively alleged in the complaint by appellant, that the acts of the defendants created a monopoly in railway traffic in northern Minnesota, was in restraint of trade and commerce, not only in Minnesota but between the different States, and constituted a violation of the anti-consolidation, as well as the anti-monopoly statutes of the State of Minnesota and the Federal anti-trust act.

Two Federal questions are clearly set forth in appellant's bill of complaint, which gave the Circuit Court of the United States jurisdiction over the subject matter of the action, and the Circuit Court was called upon to determine:

A. Whether the State to protect its proprietary interests had a cause of action against the defendants arising in part under the Federal Anti-Trust Act;

B. Whether the State anti-consolidation and anti-trust acts (rightly construed) had been violated. This presents a controversy between the appellant and the defendants, the correct determination of which involves or depends upon the construction and the *application* of the commerce clause as well as Article IV of the Constitution of the United States.

These questions may be considered in their order.

A.

Did the appellant fairly tender an issue of law and fact arising under or depending upon a correct construction of the Federal Anti-trust Act?

Supplemental to what we said in subdivision IX of our brief in this case we add the following:

For the purpose of this inquiry, we submit, it is immaterial how the question may be determined. The test is, whether the issue was fairly tendered. That it was so tendered and that a like issue has not been determined by this Court must be conceded.

An issue was tendered in which the appellant alleged the commission of certain acts by the defendants which were specifically asserted to be not only seriously injurious to its proprietary interest, but in violation of the Federal Anti-Trust Act. The appellant not only charged a violation of the act in paragraph 18 of its bill of complaint—record 37a—but the learned trial court in its decision *actually construed the act adversely* to one contention of appellant—Record 119a, fol. 473—and this construction rendered it unnecessary for the court to construe the act with reference to the other questions submitted. In this portion of the decree the court construed the act as excluding the appellant from invoking equity jurisdiction for its enforcement. Again, upon the argument in this court appellant's contentions upon both propositions were strenuously opposed by counsel for appellees.

It is therefore submitted that the pending controversy is one in part "arising under and depending upon the construction of the laws of the United States."

Ames vs. Kansas, 111 U. S. 462;
Postal Tel. Cable Co. vs. Alabama, 155 U. S., 482.
Gold Washing & Water Co. vs. Keys, 96 U. S. 203;
Shoshone Mining Co. vs. Rutter, 177 U. S. 507;
Cummings vs. Chicago, 188 U. S. 410;
Defiance Water Co. vs. Defiance, Oct. Term, 1903;
N. P. Ry. Co. vs. Townsend, 190 U. S. 270.

The test as to jurisdiction of the Circuit Court is clearly stated in the opinion of the court in *Gold Washing & Water Co. vs. Keyes, supra,* and affirmed in the case of *Shoshone Mining Co. vs. Rutter, supra,* (p. 507), as follows:

> *"A suit must, in part at least,* arise out of a controversy between the parties in regard to the operation and effect of the Constitution or *laws* upon the facts involved. * * * Before, therefore, a Circuit Court can be required to retain a cause under its jurisdiction, it must in some form appear upon the record by a statement of facts in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or *effect* of the Constitution or some law or treaty of the United States."

In *Railroad Company vs. Mississippi,* 102 U. S. 141, this Court said:

> "That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted; * * *

"That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved."

In the case of *Chapman vs. Goodnow*, 123 U. S. 540, this Court said, quoting from syllabus:

"If a Federal question is fairly presented by the record and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Rev. Stat. §709, as if it had been specifically referred to, and the right directly refused."

Again, in the case of *Kaukauna Water Power Company vs. Green Bay and Mississippi Canal Company*, 142 U. S. 254, this Court said:

"This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court. *Wilson vs. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Armstrong vs. Athens County*, 16 Pet. 281; *Chicago Life Insurance Co., vs. Needles*, 113 U. S. 574; *Eureka Lake Co. vs. Yuba County*, 116 U. S. 410."

Again, in the case of *O'Neil vs. Vermont*, 144 U. S. 323, this Court said:

"If that court could, by that assumption, bind this court, the supervising authority of our jurisdiction would be lost in every case by the simple assertion of the court below that it placed its decision on some particular ground of its own creation. To assent to any such doctrine would be to abrogate our jurisdiction in a most important particular. And that is, in my judgment, exactly what is done in this case. In the opinion of the

majority it is stated that the only question considered by the Supreme Court of Vermont, in regard to the present case, was whether the liquor in question was sold by O'Neil at Rutland or Whitehall, so as to fall within or without the statute of Vermont, and it arrived at the conclusion that the completed sale was at Vermont. That, says this Court, does not involve any Federal question. To this I answer, that before the state court could reach the question whether the sale fell under the law of Vermont it had to determine whether the sale was completed in that State, or in New York—whether, therefore, an executory sale of goods in New York, completed in Vermont, was or was not a transaction of interstate commerce, and until that question, which was a Federal one, was disposed of, the alleged State question could not be considered. But that the commercial question was brought to the attention of the Supreme Court of Vermont, was argued by counsel there and passed upon by that court, does not rest as an inference from the facts necessarily involved: It appears from its opinion and the official report of the case."

In *Northern Pacific Railway Company vs. Townsend* (supra), this court held that whenever a right is claimed under an Act of Congress, and the determination of such claim is dependent upon the nature and effect of such Act, its solution necessarily involves a Federal question.

Although strictly speaking, outside the present inquiry, upon the proposition that the trial court erred in its construction of the Federal Anti-trust Act, we suggest further, that while this act specifically authorizes the Attorney General of the United States to enforce it by injunctional proceedings, on behalf of and in the name of the United States, and it must be admitted that the State of Minnesota is without authority to do so, still attention is particularly called to Section 7 of this Act, which provides for the institution of an action by any individual to recover damages for private injuries suffered. Congress therefor contemplated not only the

enforcement of the Act by the National Government, but authorized private actions by individuals to recover damages for acts done in violation thereof. It is submitted that in all cases in which a right of action exists for damages, the same right of private action is preserved in equity to an individual, to enjoin the commission of an act which will cause grave injury of an irreparable nature, such as cannot be adequately compensated at law.

If this construction of the Act of Congress obtains in the application of the rule invoked, it is clear from the record that the state has suffered, and will continue from year to year to suffer, damages to its proprietary interests difficult, if not impossible, to measure, running into millions of dollars.

The rule is clearly stated by this Court in *Parker vs. W. L. C. & W. Co.*, 2nd Black 551, as follows:

> "A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. 2 Swanst. 335; 16 Vesey, 342; 2 Ver. 646; 2 Bro. C. R. 64; 10 Vesey, 163; 6 Paige 83, Wat. Eden, 659, note.
>
> It will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damage at law, or is such, as from its *continuance or permanent mischief*, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction. Mitf. Eq. Pl. by Jeremy, 144, 145; Jer. Eq. 300; 1 Dick 163; 16 Ves. 342; 6 J. C. R. 46; 6 Paige, 83."

See also *Clark vs. Smith*, 13 How. 194; *Pennsylvania vs. Wheeling Bridge Co.*, 13 How. 518.

In *Pennsylvania vs. Wheeling Bridge Co.* (*supra*), this Court not only held that it had original jurisdiction over an action brought by the State of Pennsylvania, but enjoined the Wheeling Bridge Company from the construction of a bridge which, if built, would

have injured the State of Pennsylvania in its proprietary interests only a fractional part as seriously as the creation of a monopoly in railway traffic in Minnesota will affect the proprietary interests in that State.

In deciding the issues the Court used the following language:

> "If the bridge be such an obstruction to the navigation of the Ohio as to change, to any considerable extent, the line of transportation through Pennsylvania to the northern route through New York, or to a more southern route, an injury is done to the State of Pennsylvania as the principal proprietor of the lines of communication by canal and railroad, from Philadelphia to Pittsburg. And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily prosecutions, for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country."

Upon the proposition that a state may sue to redress injuries which are strictly analogous to those suffered by private individuals, see

United States vs. San Jacinto Tin Co., 125 U. S. 273;

United States vs. American Bell Telephone Co., 128 U. S. 315-317;

Missouri vs. Illinois, 180 U. S. 240;

Kansas vs. Colorado, 185 U. S. 125.

B.

The violation of the Minnesota anti-consolidation and anti-trust act, rightfully construed, involves, as applied to this controversy, the construction and the application of Article IV of the Federal Constitution, as well as the commerce clause.

Article IV as finally adopted, reads:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other state, * * "

Its history, which was presented in a former brief, may be found in—

4th *Elliott's Debates*, 123;

5th *Ditto*, 487-8, 504.

The gravemen of the charge in appellant's complaint is that the defendants created a corporate device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactments of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded.

The various public acts of the legislature of Minnesota were pleaded in the bill of complaint and a violation charged,and we submit their scope under the Constitution, as well as their construction and effect, constituted one or more of the issues tendered by appellant. The complaint at the end of paragraph 11, also specifically charged a violation of rights guaranteed by Article IV. What the trial judge decided can have no bearing upon the jurisdiction of the court over the subject matter of the action. The test of jurisdiction must necessarily be determined by a correct answer to the question: What issues were fairly tendered for determination by the bill of complaint? If this be not the test the trial court by misconstruing a statute, has the power to eliminate from the record a jurisdictional question and deprive a party of the right of appeal.

The question of whether or not the case was properly removed from the state to the Federal Court, is in itself a Federal question.

See *Railroad Company vs. Koontz,* 104 U. S. 15.

The determination of this question in itself gives the right of appeal to this court direct.

The case having been appealed to this court, and this court, on its own motion, having questioned the correctness of the removal from the State to the Federal Court, that establishes the jurisdiction of this Court on appeal over the entire case should this court determine that the case was properly removed from the State to the Federal Court.

See, *Oakley vs. Goodnow,* 118 U. S. 44.
Scott vs. Goodnow, 165 U. S. 58.
Carter vs. Texas, 177 U. S. 442.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903. No. 433.

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JAMES H. McKENNEY,
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State of Minnesota, Appellant,

vs.

Northern Securities Company and others, Appellees.

SUGGESTIONS AGAINST MOTION TO ADVANCE THE APPEAL.

The appellees oppose the motion so to advance the hearing of this appeal that the same may be argued in connection with the case of Northern Securities Company *vs.* The United States, because (1) the legal questions involved are entirely different, and (2) such advancement would compel counsel at great inconvenience to prepare to argue an appeal which, because improperly taken, will upon motion be dismissed.

1. THE LEGAL QUESTIONS INVOLVED IN THE TWO APPEALS ARE DIFFERENT.

The United States case involves the interpretation of a law of the United States, known as the Sherman Act. The question thus raised is a Federal one, appropriately arguable and determinable in a cause in which the United States itself, represented by its Attorney-General, is a party. The discussion of this question cannot be aided by a simultaneous discussion of the question involved in the Minnesota case, namely, the proper interpretation of local statutes. It is true, that incidentally in this case, the State of Minnesota relies upon the Sherman Act; but the decision of what that Act means, in the suit brought by the United States, will finally settle that question. Nothing will be gained by its discussion in any other cause.

No advantage can accrue from a simultaneous argument of the various questions arising under the laws of Minnesota, with those arising under the Act of Congress, whilst counsel, by such simultaneous argument, will be embarrassed.

It is suggested by the appellant, that because of the voluminous Record, it will be advantageous to consider, at one time the large body of testimony, which it claims is the same in both cases. This claim is only partially true. A considerable amount of testimony, not taken in the Northern Securities case, appears in this Record. All the testimony, however, being largely cumulative, its examination and consideration will involve no great expenditure of time.

2. AN APPEAL SHOULD NOT BE ADVANCED FOR ARGUMENT ON THE MERITS, WHICH, UPON MOTION, MUST BE DISMISSED.

This appeal was taken on the twenty-fifth day of September, 1903. If counsel are compelled to argue it on the 14th of December, they will be much inconvenienced. Such inconvenience ought not perhaps to be regarded, if any great public advantage would result from an advancement of the appeal. No such advantage, however, will, or can, accrue.

The taking of the present appeal directly from the Circuit Court of Minnesota can be sustained only upon the ground that a question arising under the Constitution of the United States is by it raised. The record shows that the real controversy arises upon an assertion by the State of Minnesota: (1) that certain statutes of Minnesota have been violated by the appellees; (2) that by the appellees the Sherman Act has been violated.

The Circuit Court, in the opinion filed by Judge Lochren, decided three points:—

(*a.*) That the acts of defendants did not violate the statutes of Minnesota prohibiting consolidation of parallel railways.

(*b.*) That treating the State Anti-Trust Law as valid, it did not prohibit what had been done by defendants.

(*c.*) That the State of Minnesota could not proceed by injunction to compel an observance of the Act of Congress called the Anti-Trust Law.

Clearly, none of these rulings involves the interpretation or effect of the Constitution of the United States.

The direct appeal to this Court can be sustained, if at all, only under section 5 of the Act of March 3rd, 1891, which provides for such appeal:—

"In a case that involves the construction or application of the Constitution of the United States."

Under this Act the case must *involve* some question of the Constitution *really* and not imaginatively. While it is immaterial, unlike writs of error from the State courts, how the question was decided, still the rule applied in Sawyer *vs.* Piper, 189 U. S. 154, to such writs of error, viz., that the question must be a real, and not a fictitious one, is applicable to appeals and writs of error from the Circuit Courts. Otherwise any case could so be framed by an artful pleader that it could be brought direct to this court.

Under the Act of 1896 a *Federal* question merely is not sufficient to justify a direct appeal. It must be a question involving the Constitution of the United States. It is not material to inquire on what grounds the Circuit Court took jurisdiction. The question here is, not whether a judgment of the Circuit Court of Appeals would be final under section 6 of the Act of 1891, but whether, under section 5, a direct appeal can be taken from the Circuit Court to this court. Nor is it material that a constitutional question *might* have been raised by appellee had he been defeated below, or that, if some different decision had been made in the case, a constitutional question *might have become involved.* The decisions of this court settle that the constitutional question must be actually in the case; *i. e.*, must, in fact, have been decided by the lower court or have been necessarily involved in what was decided.

Ansbro *vs.* United States, 159 U. S., 695, 697;
Cornell *vs.* Green, 163 U. S., 75, 78;
Muse *vs.* Arlington Hotel Co., 168 U. S., 430, 435;
Western Union Telegraph Co. *vs.* Ann Arbor R. R. Co., 178 U. S., 239, 243;
Lampasas *vs.* Bell, 180 U. S., 276, 282.

No question, arising under the Constitution of the United States, appears in this record, unless it is to be found in an averment, added by way of amendment to the bill at the final argument of the cause, after the decision of the Circuit Court of the suit of The United States *vs.* Northern Securities Company, in these words:—

> "And if said Northern Securities Company is allowed "to hold and control the stocks of said Railway Compa- "nies and to carry out the purpose and object of its in- "corporators, as well as its own, full faith and credit will "not be given to the public acts of this complainant, and it "will be deprived of a further right guaranteed to it by "the Constitution of the United States."
>
> Vol. I. Record, page 26.

The only assignments of error which suggest a constitutional question are the twenty-sixth and twenty-seventh (Vol. 1 Record, page 131), reading as follows:—

> "(26.) The court erred in finding and holding that the "plan and purpose of organizing the Northern Securities "Company for the purpose and in the manner set forth "in complainant's complaint, and as shown by the testi- "mony; and the subsequent consummation of such plan "and purpose by the issuance and exchange of the stock "of the Northern Securities Company for a majority of "the stock of the Great Northern and Northern Pacific "Railway Companies, did not invade and violate the "rights guaranteed to the State of Minnesota under "Article IV. of the Constitution of the United States.
>
> "(27.) The court erred in finding and holding that the "formation of the Northern Securities Company under "the laws of the State of New Jersey for the purpose set "forth in complainant's complaint, and as shown by the "testimony; and the attempt of the incorporators of said "Northern Securities Company to avail themselves of the "sovereign power of New Jersey, delegated by said laws, "for the purpose set forth in complainant's complaint, "and as shown by the testimony, did not constitute a "violation of the right guaranteed to the State of Min- "nesota under said Article IV. of the Constitution of the "United States, which provides that full faith and credit "shall be given in each State to the public acts and "records of every other State."

It is only necessary to glance at the above-quoted averment of the bill and assignments of error, to see that no question arising under the Constitution of the United States is involved, and that there was no right to bring here, an appeal direct from the Circuit Court. It is too obvious for serious discussion, that the provision of the Constitution referred to by the appellant can, in no possible view, have aught to do with the case. Whatever ruling may be made or conclusion reached, no interpretation or application of that provision can become involved. As well might the appellant have referred at random to any other clause of the Constitution. The reference to the one arbitrarily selected, seems clearly to have been an effort of the pleader to create an artificial ground for a direct appeal to this court. If the effort proves successful, the efficiency of the Circuit Courts of Appeals in relieving this Court of an intolerable burden of legal work, will be at an end.

We submit, therefore, that as the appeal will be dismissed upon a motion to dismiss, which will be made without delay, but which, under the rules of this court, cannot be submitted until the thirtieth day of November, the only effect of making the order of advancement requested would be, to compel counsel, unnecessarily, to prepare, at great inconvenience, for an argument which will not be heard.

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